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AGENCY FOR INTERNATIONAL DEVELOPMENT

48 CFR Chapter 7

RIN 0412-AA94

U. S. Agency for International Development Acquisition
Regulation (AIDAR): Designation of Personal Services
Contractors (PSCs) as Contracting Officers and Agreement
Officers

AGENCY: U.S. Agency for International Development.

ACTION: Proposed rule.

SUMMARY: The U.S. Agency for International Development (USAID) proposes to amend the Agency for International Development Acquisition Regulation (AIDAR) to allow for the designation of U.S. Personal Services Contractors (US PSCs) and Cooperating Country National Personal Services Contractors (CCN PSCs) as contracting officers and agreement officers. The proposed revisions will address a shortage of U.S. direct-hire staff by delegating the

proposed authorities to qualified US and CCN PSCs. The delegation of limited contracting/agreement officer authorities to a select number of CCN PSCs will also bolster the Agency to succeed in terms of building long-term, host country technical capacity to materially assist the Missions with procurement responsibility.

DATES: Comments must be received no later than [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.]

ADDRESSES: Address all comments concerning this notice to Anne Sattgast, Bureau for Management, Office of Acquisition and Assistance, Policy Division (M/OAA/P), Room 867-D, SA-44, Washington, DC 20523-2052. Submit comments, identified by title of the action and Regulatory Information Number (RIN) by any of the following methods:

1. Through the Federal eRulemaking Portal at <http://www.regulations.gov> by following the instructions for submitting comments.

2. By Mail addressed to: USAID, Bureau for Management, Office of Acquisition & Assistance, Policy Division, Room 867-D, SA-44, 1300 Pennsylvania Ave. NW., Washington, DC 20523-2052.

FOR FURTHER INFORMATION CONTACT: Anne Sattgast,
Telephone: 202-567-5094 or E-mail: asattgast@usaid.gov

SUPPLEMENTARY INFORMATION:

A. Instructions:

All comments must be in writing and submitted through one of the methods specified in the Addresses section above.

All submissions must include the title of the action and RIN for this rulemaking. Please include your name, title, organization, postal address, telephone number, and e-mail address in the text of the message.

Please note that USAID recommends sending all comments to the Federal eRulemaking Portal because security screening precautions have slowed the delivery and dependability of surface mail to USAID/Washington.

At the end of the comment period and until finalization of the action, all comments will be made available at <http://www.regulations.gov> for public review without change, including any personal information provided. We recommend you do not submit information that you consider Confidential Business Information (CBI) or any information that is otherwise protected from disclosure by statute.

USAID will only address substantive comments on the rule. Comments that are insubstantial or outside the scope of the rule may not be considered.

B. Background.

On August 19, 2016 USAID published a proposed rule at 81 FR 55405 revising the U.S. Agency for International Development Acquisition Regulation (AIDAR) to incorporate the USAID Cooperating Country National Warrant Program into the regulation. The proposed rule was subsequently withdrawn on June 23, 2017, at 82 FR 28617, due to changes in the regulatory requirements and processes.

USAID has further analyzed the need for contracting/agreement officers and has determined that the ability to designate both US PSCs and CCN PSCs as contracting/agreement officers would be a benefit to the Agency. It would relieve USAID staff from the administrative burden of processing deviations and exceptions currently required in Agency regulation and ultimately result in cost savings to the Agency.

USAID is seeking comments on the proposed rule as described below:

Designation of U.S. personal services contractors as
contracting officers and agreement officers.

The U.S. Agency for International Development (USAID) is located in offices in over 80 countries with programs in over 100 nations. USAID operates in a fluid environment responding to a myriad of crises such as war, natural disasters, epidemics, as well as working towards its long term mission of reducing poverty, strengthening democratic governance, and helping people emerge from humanitarian crises and progress beyond assistance.

The current warranted work force to manage these efforts consists of 120 US direct-hire foreign service officers overseas, 84 direct-hire civil service officers, 63 warranted foreign service executive officers, 10 warranted US PSCs, and eleven warranted CCN PSCs. Additionally, the foreign service contracting staff has one of the highest attrition rates in USAID's work force that needs to be supplemented by additional personnel. There has been a decrease of over 20% in the Agency's direct-hire contracting officer staff from 2016 to 2018. The ability to designate US PSCs as contracting/agreement officers will help offset this decrease in the number of warranted direct-hire civil service and foreign service employees and

increase the capacity of the Agency's acquisition workforce to process actions in an expeditious manner.

Currently, a US PSC can be designated as a contracting officer only when a deviation from AIDAR 701.603-70 is approved; and when the Assistant Administrator for the Bureau for Management (AA/M) approves an exception in accordance with AIDAR Appendix D 4(b)(3)e. The proposed rule will also reduce the administrative burden on Management Bureau employees in processing requests for deviations and exceptions, allowing them to focus on other priorities.

US PSCs will be designated as contracting/agreement officers similar to the direct-hire employees upon meeting the requirements in FAR subpart 1.6 and the Agency's warrant program requirements.

Designation of Cooperating Country Nationals personal services contractors as contracting officers and agreement officers.

In 2011, USAID approved a two-year Worldwide CCN Administrative Contracting and Agreement Officer (ACO/AAO) Pilot Warrant Program. The purposes of this program were to address the shortage of USAID contracting/agreement officers, alleviate the workload of contracting/agreement

officers, and build long-term, host country technical capacity to materially assist the Missions with procurement responsibility.

USAID made a strategic decision to create a cadre of highly qualified CCN PSCs, who demonstrated high potential for assuming responsibilities to serve as administrative contracting/agreement officers within designated Missions. The program evolved into a permanent program in 2014, as detailed below. During the two phases of the program, USAID has issued a total of 12 CCN warrants. Currently, there are eight warranted CCN administrative contracting/agreement officers. By the end of calendar year 2018, the Agency anticipates that there will be approximately 10 warranted CCN PSCs contracting/agreement officers. While a seemingly small number, it would represent a five percent increase in USAID's overseas US direct-hire warranted contracting/agreement officers.

When designing the CCN Pilot Warrant Program, USAID consulted with the Senior Procurement Executive at the State Department and the USAID employee unions. The State Department's SPE advised that State conducted a similar pilot several years ago, to great success. They now have a permanent program that extends limited authority to their locally-employed staff in selected countries. The vice

president of the American Foreign Service Association concurred with the Pilot, and was pleased by several of its protections.

Based on that two-year pilot program, revisions were made to the program structure to better suit the Agency's needs before the permanent program was launched in September 2014. USAID eliminated the portion of the program that allowed for third country nationals to receive warrants. Participation was broadened by the revision of qualifications and inclusion of full obligation warrant authority up to the simplified acquisition threshold of \$150,000 per transaction and an annual cumulative amount of \$1 million at the potential CCN Grade 13 Level to assist the Missions' procurement function. To mitigate CCN inexperience from leading to mistakes or malfeasance, the revised 2014 CCN Warrant Program included three levels of obligation authority and non-monetary administrative responsibility correlating to CCN grade/experience within the acquisition backstop. Increasing degrees of responsibility and/or obligation authority, as applicable, were granted. The levels of contracting/agreement officer responsibilities designated to a CCN was based on the needs of each mission, complexity and dollar value of the acquisitions, and the individual's experience, training,

education, business acumen, judgment, reputation and grade level.

After implementing the 2014 CCN PSC warrant program for almost six years (including the pilot period before 2014), USAID is further revising the program based on Agency needs, experience with the current program, and in response to public comments received under the proposed rule at 81 FR 55405 published in the Federal Register on August 19, 2016. The new program will have a single warrant level that will combine the first two warrant levels from the 2014 program. This new warrant level will be available to qualified CCN PSCs at specific grade levels who meet training, years of experience, and education requirements. This warrant authority delegates select contract administration functions listed in (48 CFR) FAR 42.302(a), including, for example, conducting post-award orientation conferences, approving contractors' requests for payments under the progress payments or performance-based payments clauses. This warrant authority will also include the ability to obligate incremental funding of any amount within the scope and total estimated cost of a contract (to include task orders and purchase orders). This change in the CCN warrant program also responds to a request from

some USAID Missions, where assistance with incremental-funding actions is needed.

The revised warrant program also eliminates the third warrant level set at the simplified acquisition threshold. This change responds to several public comments received under the proposed rule at 81 FR 55405 published in the Federal Register on August 19, 2016. Authorizing CCNs to execute new awards on behalf of the U.S. Government had inherent risks that could not be sufficiently mitigated. As such, USAID decided to eliminate the simplified acquisition threshold warrant. Additionally, no simplified acquisition threshold warrants had been issued under the 2014 CCN warrant program.

Analysis of risk associated with designating Non-U.S. citizens as contracting and agreement officers.

While many CCNs that work for USAID do so for many years with demonstrated commitment to the United States mission in their country, non-U.S. citizens with contracting officer authorities inherently present additional risks, including litigation risk for the Government. Since CCNs are ingrained in their communities and economic markets, there can be greater risk of procurement integrity issues with taxpayer funds or local suits brought directly against

the CCN for actions taken in their official capacity. In suits against the U.S., a CCN might have less incentive to act as a witness for the Government's defense as a non-citizen. Prior to establishing the permanent CCN warrant program, the Agency reviewed additional risks associated with issuing contracting/agreement officer warrants to non-U.S. citizens who are not direct-hire employees of USAID. In particular, such factors as proper accountability, adequate security considerations, conflicts of interest, and appropriate legal jurisdiction over the employee were considered. Adequate management controls and warrant limitations established under the CCN PSC warrant program, as discussed below, were established to mitigate such risks.

To address the risks associated with adequate accountability, commitment to USAID, and conflict of interest, the warrant program requires candidates for the CCN PSC warrant program to show commitment to the profession and USAID by meeting stringent acquisition competencies, education and training requirements. In addition to meeting these requirements, potential candidates must have extensive experience in direct U.S. Federal Government contracting/assistance and clearly demonstrate professional and ethical behavior. When

reviewing applications for a CCN PSC warrant, the Agency contacts past performance references (typically, the candidate's last three Supervisory Contracting Officers) and any other sources deemed appropriate for signs of potential risks or cautions that may be detrimental to the responsibilities inherent in this Program. The candidate's supervisor must also attest to the candidate's education, training, experience, business acumen, judgment, character, reputation and ethical behavior.

Additionally, the Program requires the CCN contracting officer's supervisor to closely and frequently monitor the CCN PSC's work and review performance and progress every six months. The review includes an assessment of all actions where the warrant was used. This review is followed by periodic reviews conducted by the Bureau for Management, Office of Acquisition and Assistance, Evaluation Division, which is responsible for the program implementation.

Warranted CCN PSCs will support the functions of the overseas Mission's Office of Acquisition & Assistance (A&A), which typically include acquisition and assistance awards implementing the Agency's foreign assistance programs and activities. In part to mitigate litigation risks, warranted CCN PSCs are currently not delegated authority to make new awards or execute any personal

services contracts. The program also limits delegated authority for select contract administration functions listed in (48 CFR) FAR 42.302(a), specifically, the contracting officer functions in which disputes or possible legal challenges may arise due to decisions of the contracting officer, functions related to novation and contractor name changes, which may be a result of changes in a contractor's business structure as governed under applicable U.S. state law and other functions based on U.S. state laws, functions related to small business contracting matters and those requiring extensive knowledge of specific U.S. laws and government-wide policies not specifically related to contracting. Accordingly, the functions specified in items 5-7, 9-12, 18, 21-26, 29, 32, 50, 52-55, 62-63, 66 and 68-71 of (48 CFR) FAR 42.302(a) will not be redelegated to CCN PSC contracting officers.

To address conflict of interest and procurement integrity concerns, the program relies on the standard clause entitled "Compliance with Laws and Regulations Applicable Abroad", included in all personal services contracts with CCNs, that mandates compliance with the Standards of Conduct for Executive Branch Employees. These standards, available at

<https://www2.oge.gov/web/oge.nsf/All%20Documents/5D633072D0>

B2DB5085257E96006A90E7?opendocument, contain two provisions addressing financial interests that conflict with an individual's official duties. The first provision, entitled "Disqualifying financial interests," prohibits an employee from participating in an official government capacity in a matter in which he has a financial interest or in which his spouse, minor child, employer, or any one of several other specified persons has a financial interest. The second provision, entitled "Prohibited financial interests," contains authority by which agencies may prohibit employee from acquiring or retaining certain financial interests.

To address the security concerns, the Program uses the current process, in which the USAID Office of Security and Department of State Office of Security conduct background checks on potential personal service contractors.

Recognizing the fact that some countries may not have adequate legal systems or may be unwilling to provide assistance in prosecuting or defending their citizens for alleged U.S. procurement infractions, the CCN PSC Warrant Program established the following management controls designed to minimize the risk that such legal actions might be necessary:

- Stringent eligibility criteria,
- Inability for CCN PSCs to enter into new awards,

- CCN participation in this program is limited to two candidates per overseas mission. This limitation may be expanded only if it is deemed by the Senior Procurement Executive to be in the best interest of the Agency.
- Ongoing risk assessments are performed throughout the Program implementation to assure compliance with the program requirements. The warrant program may be revised as a result of these assessments.

Regulatory authorities and limitations.

(48 CFR) FAR part 1 establishes the authority for Agency heads to select and appoint contracting officers and it does not specify that contracting officers must be U.S. citizen direct-hire employees of the Federal government.

(48 CFR) FAR subpart 7.5 includes contracting officer duties in the list of inherently governmental functions or functions that must be treated as such, but does not exclude personal services contractors hired under a statutory authority from performing such functions.

(48 CFR) AIDAR 701.603-70 currently limits delegations of contracting officer authorities to U.S. citizen direct-hire employees of the U.S. Government as a matter of Agency policy. However, section 4(b)(3) of (48 CFR) AIDAR Appendix D and the corresponding section of Appendix J

contain an exception for PSCs to be delegated authority to sign obligating and subobligating documents with approval from the Assistant Administrator for the Bureau of Management.

In September 2014, USAID issued a two-year class deviation from 48 CFR) AIDAR 701.603-70 to establish the permanent CCN PSC warrant program to allow a limited number of selected and qualified CCN PSCs to be delegated contracting officer authorities. In conjunction with the approval of the class deviation described above, the Assistant Administrator for the Bureau for Management (AA/M) approved a class exception to the limitations in (48 CFR) AIDAR Appendix J 4(b)(3). Subsequent two-year class deviations were issued for the CCN warrant program in September 2016 and September 2018. The September 2018 class deviation also allows for the designation of US PSCs as contracting officers without requiring prior approval from AA/M. By this rule USAID is proposing to revise (48 CFR) AIDAR to permanently authorize delegation of contracting/agreement officer authorities to a limited number of selected and qualified US PSCs and CCN PSCs.

USAID is seeking public comments on the proposed changes to the AIDAR. These proposed changes will eliminate the

need for an exception from AA/M currently required before the Director, Bureau for Management, Office of Acquisition and Assistance (M/OAA Director) can designate qualified US and CCN PSCs as contracting/agreement officers. The proposed changes also eliminate the need for a class deviation from AIDAR 701.603-70. As the M/OAA Director both approves AIDAR class deviations and delegates individual warrant authority this proposed change will eliminate a redundancy in the designation of qualified US and CCN PSCs as contracting/agreement officers.

C. Impact assessment.

1) Regulatory Planning and Review.

Under E.O. 12866, the Office of Information and Regulatory Affairs (OIRA) has determined this regulatory action is "significant" and therefore subject to the requirements of the E.O. and subject to review by the Office of Management and Budget (OMB). OIRA has determined that this Rule is not an "economically significant regulatory action" under Section 3(f)(1) of E.O. 12866. This proposed rule is not a major rule under 5 U.S.C. 804.

This rule codifies the Agency's deviation from the current rule in the CFR. The costs calculated in this section are based on conservative estimates to illustrate

the impact of these revisions from the baseline costs of the current rule. The proposed rule's cost benefit is due to the ability to designate CCN PSCs as Contracting Officers, eliminating the need to assign a warranted Foreign Service Officers (FSOs) to a Mission. It costs the Agency approximately an average of \$250,000 per year to post a warranted FSO to a Mission. This figure is based upon the Foreign Service pay scale and data from the Department of State's Office of Allowances.

The Agency's warranted FSO staff is comprised of individuals at the FS-4 to the FS-1 grade levels with the majority at the FS-2 and FS-3 grade levels. The \$250,000 figure assumes a base salary of \$100,000, which is within an average range of the FS-2 and FS-3 grade levels. An FSO's annual compensation and benefits package easily exceeds this base salary and can vary based upon the FSO's number of dependents and a variety of allowances that may be claimed including cost of living allowance, post differential, danger pay, separate maintenance allowance, housing allowance, education allowance, home leave, etc. Based upon data pulled from the Department of State's Office of Allowances, \$250,000 per annum is considered a conservative estimate of the cost to field a warranted FSO. Given that the Agency currently has eleven warranted CCN

PSCs, this eliminates the need to post the equivalent number of warranted FSOs, resulting in annual cost savings to the Agency of approximately \$2.75 million.

The ability to issue a warrant to PSCs does not result in any increase in costs to the Agency. Eligible CCN PSCs live in country and are already working at the Missions. There is also no additional cost to the Agency to process a PSC warrant as compared to a US direct-hire employee.

As a regulatory matter, the cost of the rule making process to incorporate these revisions into the regulation is justified. The Agency requires these revisions in order to eliminate the administrative burden of processing deviations and exceptions and to realize a cost savings resulting from the ability to issue CCN PSCs warrants.

2) Regulatory Flexibility Act. The rule will not have an impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. Therefore, an Initial Regulatory Flexibility Analysis has not been performed.

3) Paperwork Reduction Act. The proposed rule does not establish a new collection of information that requires the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR parts 701 and Appendices D and J
to Chapter 7

Government procurement.

For the reasons discussed in the preamble, USAID proposes
to amend 48 CFR Chapter 7 as set forth below:

1. The authority citation for 48 CFR 7 part 701 continues
to read as follows:

Authority: Sec. 621, Pub. L. 87-195, 75 Stat. 445, (22
U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR
56673; and 3 CFR 1979 Comp., p. 435.

PART 701 -- FEDERAL ACQUISITION REGULATION SYSTEM

Subpart 701.6 -- Career Development, Contracting Authority,
And Responsibilities

2. Revise 701.603-70 to read as follows:

701.603-70 Designation of contracting officers.

A contracting officer represents the U.S. Government
through the exercise of his/her delegated authority to
negotiate, sign, and administer contracts on behalf of the
U.S. Government. The contracting officer's duties are
sensitive, specialized, and responsible. To ensure proper
accountability, and to preclude possible security, conflict
of interest, or jurisdiction problems, USAID contracting
officers must be U.S. citizen direct-hire employees of the
U.S. Government. However, Director, Bureau for Management,

Office of Acquisition and Assistance (M/OAA Director) may also designate a U.S. Personal Services Contractor (USPSC) or a Cooperating Country National Personal Services Contractor (CCNPSC) as a contracting officer with a specific level of warrant authority. To qualify for a designation as a contracting officer, an individual must meet the requirements in FAR subpart 1.6 and the Agency's applicable warrant program.

3. In appendix D to chapter 7, revise paragraph 4(b)(3)b. and add paragraph (b)(4) to read as follows:

Appendix D to Chapter 7 – Direct USAID Contracts With A
U.S. Citizen Or A U.S. Resident Alien For Personal Services
Abroad

4 – Policy * * *

(b) * * *

(3)* * *

b. They may not be delegated authority to sign obligating or subobligating documents except when specifically designated as a contracting officer or an agreement officer in accordance FAR subpart 1.6 and the Agency's applicable warrant program.

* * * * *

(4) Exceptions. The Assistant Administrator Bureau for Management (AA/M) must approve exceptions to the

limitations in paragraph (b) (3). Approval of an exception by the AA/M is not required when the Director, Bureau for Management, Office of Acquisition and Assistance (M/OAA Director) designates a USPSC as a contracting officer or an agreement officer.

* * * * *

4. In appendix J to chapter 7, under the heading "4. Policy," revise paragraphs (b) (3)b. and (b) (4) to read as follows:

Appendix J to Chapter 7—Direct USAID Contracts With a Cooperating Country National and With a Third Country National for Personal Services Abroad

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4 - Policy

* * * * *

(b) * * *

(3) * * *

b. They may not be delegated authority to sign obligating or subobligating documents except when a cooperating country national personal services contractor is specifically designated as a contracting officer or an agreement officer in accordance FAR subpart 1.6 and the Agency's applicable warrant program.

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(4) Exceptions. The Assistant Administrator Bureau for Management (AA/M) must approve exceptions to the limitations in paragraph (b) (3). Approval of an exception by the AA/M is not required when the Director, Bureau for Management, Office of Acquisition and Assistance (M/OAA Director) designates a cooperating country national personal services contractor as a contracting officer or an agreement officer.

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Mark Walther,
Acting Chief Acquisition Officer.

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